

Tadakamalla (Migration) [2019] AATA 4640 (28 October 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Sandeep Tadakamalla
CASE NUMBER:	1824901
DIBP REFERENCE(S):	BCC2017/3252288
MEMBER:	Joseph Lindsay
DATE:	28 October 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 28 October 2019 at 5:15pm

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – non-appearance before the Tribunal – ground for cancellation – bogus document – bank loan letter – incorrect information in visa application – financial capacity – consideration of discretion – visa grant based on incorrect information – deliberate provision of false information – non-commencement of studies – enrolment cancelled for non-payment of fees – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5, 101, 103, 107, 109

Migration Regulations 1994 (Cth), r 2.41; Schedule 2, cl 500.214

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 August 2018 to cancel the applicant's Subclass 500 (Student) visa under s.109(1) of the *Migration Act 1958* (the Act). The applicant provided a copy of the delegate's decision with his application to the Tribunal.
3. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
4. The applicant was invited to have a hearing before the Tribunal on 22 October 2019 at 1:00 pm. However, the applicant failed to appear and failed to contact the Tribunal at all, whether in respect to his non-appearance or for any other reason. The hearing invitation was sent to the email address provided by the applicant. The applicant was sent two SMS messages about the hearing, and the evidence indicates that at least one of the SMS messages was received by the applicant.
5. If the applicant had appeared at the hearing, the Tribunal would have had the opportunity to ask questions of the applicant. The Tribunal would have had the opportunity to speak with the applicant about the certificate issued under s.375A of the Act, and to put information to the applicant in accordance with s.359AA of the Act. The Tribunal would have had the opportunity to ask the applicant why he appeared to provide a bogus document purportedly claiming that he had the requisite financial support in order to get a Student visa. The Tribunal would have had the opportunity to ask the applicant why he appeared to knowingly lie to the Department in order to get his Student visa, despite the clear warning to him that if documents are found to be fraudulent after the grant of a visa, the visa may subsequently be cancelled. The Tribunal would have had the opportunity to ask the applicant why he failed to respond to the notice from the Department dated 24 July 2018 that detailed such concerns.
6. Accordingly, the Tribunal has decided to make a decision on the available evidence.
7. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. On 22 August 2018, the delegate decided to cancel the applicant's Student visa. In this decision the term "visa holder" and the term "applicant" are used to describe Mr Sandeep Tadakamalla.
9. Essentially, the delegate found that the applicant's circumstances did not comply with ss.101(b) and 103 of the Act and, accordingly, cancelled the visa under s.109 of the Act.
10. Section 101(b) of the Act states:
 11. 101 Visa applications to be correct
 12. A non-citizen must fill in or complete his or her application form in such a way that:
 13. ...
 14. (b) no incorrect answers are given or provided.

15. Section 103 of the Act states:
16. 103 Bogus documents not to be given etc.
17. A non-citizen must not give, present, produce or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, produced or provided.
18. In order to be granted a Student visa, the applicant is required to provide evidence that he has sufficient funds to cover the costs and expenses of the applicant during the applicant's intended stay in Australia.
19. In his application for a Student visa, he provided a document dated "05-06-2017" on a State Bank of India letterhead.
20. In the bank loan letter addressed to the visa holder: S/O. Tadakamalla Nagender Rao, H. No: 22-2-187, Komatwadi, Hyderabad-500024, Telangana India, on State Bank of India Mansoorabad Branch 18167 letterhead and dated 05-06-2017, the following information was provided in part:
21. Ph: (+91) 7032918167
22. Email: kondepogu.ravindranath@sbi.co.in
23. SUB: Your application for credit facilities under education loan-sanction-reg
24. We refer to your loan application for Education loan for Rs. 23,00,000/-dated on 01/06/2017. We have examined the application based on the data/information provided by you and are pleased to inform you that, concern authority has sanctioned education loan on terms and conditions mentioned below
25. Based on this evidence, the applicant was granted a Student visa on 31 July 2017 and arrived in Australia on 26 August 2017.
26. On 5 September 2017 the New Delhi Caseload Assurance Section (NDCAS) of the Department undertook verification checks of the visa holder's bank loan letter. The NDCAS received confirmation that the bank loan was never sanctioned. The email verification states in part:
27. "We have gone through the download the application you sent for verification, and scrutiny we have the following to reply:
28. We confirm we have not sanctioned any Education Loan from the said branch. The authorised personal to sanction Education Loan in the BPR Segment is RACPC and the authorised signatory is AGM
29. The email ID, Cell number is genuine of the previous branch manager. The integrity of the official is beyond doubt, this can be obtained by any person who walks inside the branch premises, can ask for a visiting card, which carries all these particulars.
30. And the said loan presented for verification seems to be FAKE & FABRICATED."
31. On 24 July 2018, the Department sent the applicant a notice in accordance with s.107 of the Act advising him, in summary, of a) the information received from NDCAS as indicated above, b) the document allegedly from the State Bank of India appeared to be a bogus document, c) the applicant had apparently breached s.103 of the Act in providing the bogus

document to the Department, d) the applicant apparently gave incorrect answers to the Department in his application for a Student visa in contravention of s.101(b) of the Act. For these reasons, the applicant was advised that his Student visa was being considered for cancellation in accordance with s.109 of the Act.

32. The applicant never responded to the Department. Accordingly, on 22 August 2018, the delegate cancelled the applicant's Student visa.
33. Based on the information above, the Tribunal finds that the applicant acted in contravention of s101(b) of the Act where he provided incorrect information to the Department that he had sufficient funds to cover the costs and expenses of the applicant during the applicant's intended stay in Australia and finds that he acted in contravention of s103 of the Act where he provided a bogus document as referred to above purportedly from the State Bank of India dated "05-06-2017."
34. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
35. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
36. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

37. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled.
38. Given the information before the Tribunal as indicated above, the Tribunal is satisfied that the applicant's non-compliance was identified and particularised in the s.107 notice.
39. For these reasons, the Tribunal finds that there was non-compliance with ss.101(b) and 103 of the Act by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

40. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
41. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Migration Regulations 1994 (the Regulations). Briefly, they are:

- the correct information
 - the content of the genuine document (if any)
 - whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document
 - the circumstances in which the non-compliance occurred
 - the present circumstances of the visa holder
 - the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act
 - any other instances of non-compliance by the visa holder known to the Minister
 - the time that has elapsed since the non-compliance
 - any breaches of the law since the non-compliance and the seriousness of those breaches
 - any contribution made by the holder to the community.
42. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual (PAM3) 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.
43. My assessment of all the prescribed circumstances as set out in r.2.41 is as follows:
44. **(a) the correct information**
45. The correct information is the visa holder did not have the requisite funds to support his studies in Australia. In answer to the questions on page 8 of his Student visa application, he stated he had sufficient funds for the duration of his stay in Australia. The Department verified with the State Bank of India that a bank loan had never been issued to the visa holder's father. As the visa holder provided incorrect answers in his Student visa application the Tribunal gives this factor high weight against the applicant.
46. **(b) the content of the genuine document (if any)**
47. The visa holder provided a bank loan letter from State Bank of India in support of his Student visa application. The bank loan letter has been verified by the State Bank of India as a counterfeit document because there is no record of a bank loan having been issued to the visa holder's father. The bank loan letter is a bogus document within the meaning at paragraph (b) of s.5(1) of the Act because the State Bank of India verified a loan had never been issued to the visa holder's father and therefore it is considered a counterfeit document.
48. As the visa holder has provided a bogus document to the Department in support of his Student visa application, the Tribunal gives this factor high weight against the applicant.
49. **(c) whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document**

50. In order to meet the requirements at r.500.214 of the Regulations the visa holder provided a bank loan letter to the Department and answered financial questions at page 8 of the Student visa application form. The visa holder was found to meet the financial criterion and satisfied the decision maker he had the requisite funds to support his stay in Australia however this was achieved by the provision of the bogus bank loan letter and incorrect answers at page 8 of the form.
51. As such, the Tribunal finds the visa holder would not have met all the requirements for grant of his Student visa had the correct information been known.
52. There is no information before the Tribunal to indicate he did not meet all other criteria for grant of the visa therefore the Tribunal finds the decision to grant a visa to the visa holder was based partly on incorrect information provided at page 8 of the visa application form and a bogus document. The Tribunal gives this no weight in the visa holder's favour.

53. (d) the circumstances in which the non-compliance occurred

54. The visa holder provided incorrect answers on page 8 of the Student visa application form in relation to the availability of funds to support his stay in Australia. The visa holder provided a bogus bank loan letter in support of his Student visa application.
55. The Tribunal finds the circumstances in which the non-compliance occurred do not appear to have been beyond the control of the visa holder. The visa holder answered the questions on the Student visa application form and attested to having provided up-to-date and correct information in the Declaration at page 16 of the form. This included the information regarding his bank loan from State Bank of India. The Department has verified the visa holder's father was not issued a bank loan from State Bank of India. As it appears the visa holder has deliberately provided incorrect information and a bogus document in support of his Student visa application, the Tribunal gives this no weight in favour of the visa holder.

56. (e) the present circumstances of the visa holder

57. The visa holder arrived onshore on 26 August 2017 as the holder of a Student (subclass 500) visa. The Tribunal is aware that prior to having his student visa cancelled, he was enrolled to study a Master of Information Technology and Systems at the Victorian Institute of Technology Pty Ltd. The Tribunal is aware that the education provider notified the Department on 9 July 2018 that the enrolment had been cancelled due to non-payment of fees.
58. The Tribunal is aware that the visa holder had also been enrolled in a Master of Information Systems at Central Queensland University however this course was not completed.
59. The Tribunal is aware that the visa holder has not completed a course of study since his arrival in Australia on 26 August 2017 and his latest enrolment has been cancelled for non-payment of fees.
60. In light of the information regarding his non-commencement of studies and cancellation of his latest enrolment for non-payment of fees, the Tribunal gives this factor no weight in the visa holder's favour.

61. (f) the subsequent behaviour of the visa holder concerning their obligations under Subdivision C of Division 3 of Part 2 of the Migration Act 1958

62. The visa holder did not attend the hearing or respond to the Notice and therefore the Tribunal is unable to assess whether the visa holder agreed non-compliance occurred. As such the Tribunal gives this factor no weight in favour of the visa holder.

63. (g) any other instances of non-compliance by the visa holder known to the Minister

64. The visa holder failed to maintain his study program and has had his enrolment cancelled for non-payment of fees. Since there is no indication he is studying and as he has not responded to the Notice, the Tribunal is unable to assess this factor in relation to his intentions with his studies. As there appears to be no study plan in place for the visa holder and no current enrolment for study, the Tribunal give this no weight in the visa holder's favour.

65. (h) the time that has elapsed since the non-compliance

66. The visa holder applied for the Student (subclass 500) visa on 10 July 2017 at which time he provided incorrect answers on his Student visa application form and gave a bogus document in support of his application. As of the date of this review, over two years has passed since the non-compliance occurred in which time it appears the visa holder has not completed any course of study and has had his latest enrolment cancelled for non-payment of fees.

67. Accordingly, the Tribunal gives this no weight in the visa holder's favour.

68. (i) any breaches of the law since the non-compliance and the seriousness of those breaches

69. There are no known breaches of the law since the non-compliance occurred therefore the Tribunal gives this some weight in the visa holder's favour.

70. (k) any contribution made by the holder to the community

71. There is no information before the Tribunal to assess the visa holder's contribution to the community.

72. The Tribunal's assessment of the visa holder's response includes the following other matters:

73. • Whether there are persons in Australia whose visas would, or may, be cancelled consequentially

74. Based on the information before the Tribunal, there are no other persons in Australia whose visa would, or may, be cancelled as a consequence of cancellation of the visa holder's Student (subclass 500) visa. Accordingly, the Tribunal gives this no weight in the visa holder's favour.

75. • Whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation

76. On the information before the Tribunal, there are no obligations under relevant international agreements that would or may be breached as a result of the visa cancellation. Accordingly, the Tribunal gives this no weight in the visa holder's favour.

77. **• Whether there are mandatory legal consequences to a cancellation decision**

78. If the visa holder's visa is cancelled he would become an unlawful non-citizen and liable to be detained under s.189 of the Act and removed under s.198 of the Act. The visa holder could mitigate detention by voluntarily departing Australia.
79. The visa holder will be able to make only limited further visa applications permissible under s.48 of the Act.
80. The Tribunal gives this consideration no weight in the visa holder's favour.

81. **• Any other relevant matters**

82. There are no other relevant matters to consider.
83. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

84. Having decided that under s.108 of the Act that there was non-compliance in the way described in the notice issued under s.107 of the Act and having considered all the prescribed matters set out in r.2.41 of the Regulations, I find the reasons to cancel the visa outweigh the reasons not to cancel.
85. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Joseph Lindsay
Member

ATTACHMENT – Migration Act 1958 (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and

*This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (No.116, 2014).

¹

- (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.